United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

75-4105

United States Court of Appeals

For the Second Circuit

Nos. 75-4105
75-4113
75-4118

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
WESTERN UNION INTERNATIONAL, INC.,
Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

and

TRT TELECOMMUNICATIONS CORPORATION,
Intervenor.

B

P/S

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

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January 23, 1976

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BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

RCA Global Communications, Inc. ("RCA Globcom"), the petitioner in Docket No. 75-4113 and an intervenor in support of the Petitions in Docket Nos. 75-4105 and 75-4118, submits this brief* in support of the three Petitions for

* The parties have filed in these Dockets a deferred Joint Appendix in accordance with Fed. R. App. Proc. 30(c). Pages of the Joint Appendix are cited herein as "A- ". This brief is the final version of a document which was served and filed in typewritten form on or about December 15, 1975.

Review which have been filed by itself and by ITT WORLD COMMUNICATIONS, INC. ("ITT Worldcom") and WESTERN UNION INTERNATIONAL, INC. ("WUI") and consolidated for purposes of argument.

The petitioners are common carriers of record communications between the continental United States and overseas points (A-1, 2) and, as such, they are subject to regulation by the Federal Communications Commissions ("FCC" or "the Commission") pursuant to Part II of The Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. §§ 201-23 (1970). Their Petitions ask the Court to set aside a Memorandum Opinion and Order ("the Order") of the FCC, adopted on June 3 and released on June 6, 1975 (A-1-9) which refused to reject as unlawful certain tariff revisions filed with the Commission by a fourth such common carrier of overseas record communications, *viz.*, intervenor TRT TELECOMMUNICATIONS CORPORATION ("TRT"). These revisions relate to the provision of teleprinter exchange ("telex") service between this country and the United Kingdom and the Federal Republic of Germany. (A-1)

In accordance with the policy of Fed. R. App. Proc. 28(i) and to avoid needless duplication, RCA Globcom herewith adopts the Statement of The Case and Argument set out in the brief of ITT Worldcom, petitioner in Docket No. 75-4105. We add here only some brief supplementary material which, we believe, will enable the Court to better understand the issues presented and which will demonstrate additional reasons entitling Petitioners to the relief they seek.

Issues Presented

The occasion for these proceedings is the Commission's approval, rather than rejection, of a so-called "experi-

mental'' tariff of TRT which provides telex service at discount rates to the United Kingdom and West Germany during ''off-hours''—*i.e.,* all day on Saturdays and Sundays and before 9 A.M. and after 7 P.M. on the other days of the week. (A-1, 10) The discount rates, which cut normal telex charges from $2.55/minute to $2.00/minute (A-1, 9a) are available to subscribers anywhere in the country on the basis of the time prevailing in the Eastern Time Zone. (A-1, 15) Thus, a subscriber to telex service in New York City may obtain the benefit of the ''off-hours'' rates for traffic which he originates between 7 P.M. and 9 A.M. local time while a subscriber in, say, Los Angeles, a city in the Pacific Time Zone, may take advantage of the reduced rates between 4 P.M. and 6 A.M. as measured by his local time.

The Petitioners do not here challenge the legality of an ''off-hours'' rate or the concept of an ''experimental'' rate. We believe, however, that this particular experiment, by disregarding the time zone differences which affect the practical conduct of most business activities in this country, has so flagrantly discriminated between telex users in different sections of the United States that it violates Communications Act § 202(a), 48 Stat. 1070 (1934), 47 U.S.C. § 202(a) (1970).*

Thus, the issue before the Court is whether TRT's tariff, which provides ''off-hours'' rates to telex users in all parts of the United States on the basis of the time prevailing, not at the place where the telex traffic originates, but in the Eastern Time Zone, is unlawful within the meaning of Section 202(a).

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* The text of this section is reproduced in the brief of ITT Worldcom.

Statement of the Case

RCA Globcom adopts, for the purpose of these proceedings, the "Statement of Facts" set out in the brief of ITT Worldcom. We supplement that account with a brief description of the structure of the international telex system out of which the current disputes arise and with a further specification of RCA Globcom's role in the controversy.

*The Telex System**—The four common carriers involved in these proceedings—RCA Globcom, ITT Worldcom, WUI, and TRT—are licensed by the FCC to provide circuits between the continental United States and various overseas points. All four serve the United Kingdom and West Germany (A-6) and do so by maintaining trans-Atlantic circuits—some by cable and others by communications space satellite—with the telegraph carriers of the countries concerned, *viz.*, the British Post Office and the Deutsche Bundespost. (A-4)

The Commission authorizes the American overseas carriers to serve customers directly only in so-called "gateway" cities—New York City, Washington, and San Francisco in the case of RCA Globcom, ITT Worldcom and WUI and Miami and New Orleans in the case of TRT. In these same cities and elsewhere in the country, the overseas carriers also serve customers by means of traffic received or forwarded through the facilities of the WESTERN UNION TELEGRAPH COMPANY ("Western Union").**

Telex service provides a means by which a subscriber to the service can make a direct connection between a tele-

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* See as to the matter set forth under this heading the affidavit of Francis J. De Rosa, Esq., dated June 12, 1975, submitted in support of RCA's earlier motion for a stay in this Docket.

** WUI derives from, but for more than a decade has been an organization independent of, Western Union.

printer in his own office and a similar teleprinter at a remote point. The two stations, once connected, can exchange written traffic in much the same way as persons can exchange oral communications by telephone. Telex service is called, in the parlance of the industry, a "measured service." Analagously to the public telephone system, carriers base their charges on the length of time a caller employs the carrier's circuits, rather than on the volume of traffic he sends during the period of use.

In accord with the "gateway city" concept, the four overseas carriers may supply teleprinters and direct overseas service only to customers in their respective "gateway cities." In these same cities, and elsewhere in the country, the overseas carriers also serve customers through cooperation with Western Union.

Western Union provides the only common carrier telex service between points within the continental United States and the only telex common carrier service of any kind outside of the "gateway" cities. Its systems, which have subscribers in all parts of the country, interface with the overseas systems of RCA Globcom, ITT Worldcom, WUI and TRT. Thus, a subscriber to Western Union telex service, whether inside or outside of a "gateway" city, can communicate abroad by, in effect, dialing the message center of any of the four overseas record carriers serving the overseas point the subscriber wishes to call. The overseas carrier extends the circuit to the facilities of a domestic carrier in the foreign country which then completes the circuit with the party called.

The rates of international carriers for overseas telex calls are fixed by tariffs filed with the FCC. (A-1, 153) The FCC long has followed a so-called "country-to-country" rate policy. This means that the rates for a given call

are the same from any point in the continental United States to a given point in a foreign country. (A-1, 14, 153) That is to say, the charge for a given unit of traffic from, say, Seattle to London is the same as the charge for a similar unit of traffic passing between New York and London. This requirement is enforced, not only with respect to traffic originating with the international record carriers' own subscribers in tne "gateway" cities, but with respect to traffic originating with Western Union's telex subscribers anywhere in the country. A Western Union subscriber who places an overseas telex call is billed the appropriate tariff rate by the overseas carrier involved and is not billed by Western Union. The international carrier pays portions of the toll to Western Union (and to the correspondent carrier abroad) in accordance with FCC-supervised contractual arrangements between the overseas carrier and the connecting carriers. (A-27, 36)

RCA Globcom's Role—As noted in ITT Worldcom's brief, TRT first proposed the reduced rate service to the United Kingdom and Germany which is here in issue by filing with the Commission certain revisions to its tariff for overseas telex service on March 24, 1975. (A-10) RCA Globcom filed with the FCC its objections to this proposed tariff revision and asked that it be rejected on April 18, 1975. (A-89) The Commission, on May 2, 1975, denied the petition of RCA Globcom (and the parallel petitions of ITT Worldcom (A-37) and WUI (A-69, 89), to reject the TRT tariff revision, but stayed its effective date for thirty days. (A-133) Thereafter, the FCC allowed TRT's tariff to take effect on May 31, 1975. The Commission also adopted on June 3 and released on June 6 the Order here under review which approved TRT's tariff. (A-1)

When it became apparent that the Commission would allow TRT's tariff to take effect, RCA Globcom, ITT

Worldcom, and WUI sought leave from the Commission to make matching tariffs of their own effective on less than the thirty-day statutory notice specified in Communications Act § 203. (A-135-39) These requests were not granted, and, as the brief of ITT Worldcom notes and describes, this inaction led to motion practice in these Dockets in June of 1975. Eventually, after the hearings in this Court which ITT Worldcom's brief describes, the Commission allowed the competitive offerings of RCA Globcom, ITT Worldcom, and WUI to take effect in early July.* (A-153) A Memorandum Opinion and Order released by the Commission on June 30, 1975 directed RCA Globcom and other carriers to submit, from time to time, reports disclosing the impact of the "off-hours" rate reduction.** (A-156)

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* A fifth trans-Atlantic carrier, the French Telegraph Cable Company, has concurred in the ITT Worldcom tariff revision and thus also makes "off-hours" service available on the same basis as the carriers involved in this proceeding.

** RCA Globcom submitted its first report to the Commission's Common Carrier Bureau on November 21, 1975. This report compared traffic patterns prevailing on the RCA Globcom system in May 1975, the last month before the "off-hours" rate took effect, and September 1975. With respect to weekday telex calls sent through RCA Globcom's message center in New York to Britain, Germany, and all of Europe, the proportion of calls sent during the "off-hours" period actually fell in all three categories between May and September. But with respect to the considerably smaller volume of calls routed to Britain, Germany and Europe through RCA Globcom's operating center at Lodi, California, which serves chiefly West Coast subscribers, the proportion of weekday calls made during "off-hours" increased by over 25% in each case. This resulted, in each instance, from a jump in traffic between 4 P.M. and 6 P.M. Pacific Time at the expense of transmissions earlier in the day. The period of 4-6 P.M. Pacific Time represents, of course, that time during the normal business day in the far West in which a Pacific Coast subscriber can take advantage of an "off-hours" rate determined, not by his schedule, but by the "off-hours" schedule of telex subscribers in New York, Washington, and other Atlantic Coast centers.

ARGUMENT

The disregard in TRT's Tariff of the sender's Local Time Zone constitutes an 'Unjust or Unreasonable Discrimination'.

RCA Globcom adopts the argument of ITT Worldcom's brief which explains the almost self-evident reasons why TRT's tariff, which applies to telex subscribers throughout the country on the basis of Eastern Time, discriminates among subscribers in various parts of the nation. 7 P.M. EST and 4 P.M. PST may be the "same" time to astronomers, but they are not the "same" time to businessmen going about their day-to-day affairs in Manhattan and in Los Angeles, respectively.

For the typical telex subscriber in New York his business day is over at 7 P.M. EST. For the typical subscriber in Los Angeles (or any other West Coast city) his business day still has several hours to go. And, if he has reason to communicate by telex to Britain or Germany he has a significant commercial advantage—access to the "off-hours" discount during his business day—which his competitor on the East Coast does not enjoy. Similar, though somewhat less pronounced, effects also seem likely to occur with respect to telex transmissions to Britain and Germany by telex subscribers in the Central (*e.g.*, Chicago, Houston) and Mountain (*e.g.*, Denver, Phoenix) Time Zones. And as RCA Globcom's recent report to the Commission shows, the results one could rationally expect as a result of this discrimination are occurring.

We here add, as our contribution to the argument, some cases and statutory authorities which confirm, albeit in contexts different from the one now before the Court, the importance which the law conventionally attaches to the

differences in time zones. The differences are too weighty for the Commission to ignore.

Congress first provided legal recognition for the continental United States' four time zones during the First World War. The Act of March 19, 1918, c. 24, § 1,40 Stat. 450, formerly codified as 15 U.S.C. § 261, specified that there should be four such zones and vested the Interstate Commerce Commission, the federal agency then charged with regulation of communications common carriers, as well as railroads, with the responsibility of defining

> "the limits of each zone * * * having regard for the convenience of commerce and the existing junction points and division points of carriers engaged in commerce between the several States and with foreign nations * * *."

Section 2 of the same Act, 40 Stat. 451 (1918), formerly 15 U.S.C. § 262, provided:

> "Within the respective zones created under the authortiy of sections 261-264 of this title the standard time of the zone shall govern the movement of all common carriers engaged in commerce between the several States or between a State and any of the Territories of the United States, or between a State or the Territory of Alaska and any of the insular possessions of the United States or any foreign country. In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the Government, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of

> the United States, it shall be understood and intended that the time shall be the United States standard time of the zone within which the act is to be performed."

The latter statute provision was construed in *Sunday* v. *Madigar,* 301 F. 2d 971 (9th Cir. 1962). The court faced the question of whether the Uniform Code of Military Justice, written to take effect at 12:01 A.M. on May 31, 1951, applied to a rape which was committed in Korea after midnight Korean Time on that date, but before midnight in the United States. The court held that it did, saying that former Section 262

> ". . . manifests a general congressional intent that zoned variations in time shall be observed in determining the time when statutory rights or liabilities accrue. While the statute is not applicable by its terms to time zones outside the United States, we perceive no reason why Congress should have a different intent with regard to extra-United States zones." (301 F. 2d at 874)

The 1918 time zone statute subsequently was replaced by the Uniform Time Act of 1966, 80 Stat. 107, 15 U.S.C. §§ 260-66 (1970). The latter legislation provided additional time zones for Alaska, Hawaii, and Puerto Rico and established new procedures for use in applying daylight savings time. But it continued, with only minor modification, 15 U.S.C. § 262, which was amended to read as follows:

> "Within the respective zones created under the authority of sections 261 to 264 of this title the standard time of the zone shall insofar as practicable (as determined by the Secretary of Transportation) govern the movement of all common carriers engaged

> in interstate or foreign commerce. In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the Government, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of the United States, it shall be understood and intended that the time shall insofar as practicable (as determined by the Secretary of Transportation) be the United States standard time of the zone within which the act is to be performed."

The significance of the interests protected by the 1966 Act has been recognized in *Time Life Broadcast Co.* v. *Boyd,* 289 F. Supp. 219 (S.D. Ind. 1968), and *Allied Theatre Owners of Indiana, Inc.* v. *Volpe,* 426 F.2d 1002 (7th Cir.), *cert. denied,* 400 U.S. 941 (1970).

In *Time Life,* the court enjoined, at the behest of television broadcasters, the Secretary of Transportation from refusing to enforce the Act's daylight savings provisions in Indiana, saying:

> "The defendants' general policy of not enforcing the Uniform Time Act of 1966 is arbitrary and capricious. It promotes confusion among the citizens of Indiana. It caused irreparable harm and damage to the plaintiffs and to the citizens of Indiana and will continue to do so unless the defendants enforce the Uniform Time Act of 1966 in the State of Indiana and particularly the Daylight Savings Time provisions of the law until October 31, 1968 * * *.
>
> "The Uniform Time Act of 1966 is the law of the land and cannot be ignored. No agency of gov-

> ernment should directly or indirectly undermine its status as a law and its binding effect on the citizens of Indiana * * *." (289 F. Supp. at 230)

In *Allied Theatre Owners,* the court upheld the time zones eventually prescribed by the Secretary for Indiana, but recognized the plaintiffs' standing to challenge his determination, saying:

> "Considering now the claims of appellant Theatre Owners, there can be no question but that the owners of outdoor theatres will be hurt financially if time will be advanced under the daylight saving time provision." (426 F.2d at 1004)

We also note, as of at least heuristic significance, the provisions of the Telegraph Regulations adopted as an international treaty at Geneva in 1958. These Regulations entered into force for the United States on January 1, 1960, 10 U.S.T. 2423 (1960), and extend to the United Kingdom, Germany, and most other countries of the world, see *U. S. Dep't of State, Treaties in Force January 1, 1975* at p. 417. These Regulations are deemed to be an annex to the constituent act of the International Telecommunications Union, presently the Convention concluded at Montreux, Switzerland in 1965, to which this country, Britain, and West Germany also are parties. See 18 U.S.T. 575 (1967); *U.S. Dep't of State, Treaties in Force January 1, 1975* at pp. 416-18.

Article 4, § 6 of The Regulations provides:

> "Offices shall use the legal time of their country or of their zone. Each Administration shall notify this time or these times to the General Secretariat, which will advise the other Administrations." (10 U.S.T. at 2428)

The point, in last analysis, is simple. The Commission, by approving a TRT tariff which treats, for billing purposes, this country's vast continental domain as if it were nothing more than the District of Columbia or the Borough of Manhattan has disregarded commercial interests of substance. It has, in consequence, ignored its imperative duty, imposed by the Communications Act, to proscribe tariffs which are, in fact, unreasonably discriminatory.

CONCLUSION

The Order of the FCC released June 6, 1975 should be reversed in all respects.

Respectfully submitted

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January 23, 1976

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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ITT WORLD COMMUNICATIONS INC., et al.,

Petitioners and Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

TRT TELECOMMUNICATIONS CORPORATION,

Intervenor.

AFFIDAVIT OF SERVICE

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 26th day of January, 1976, I served 2 copies of the annexed Brief of Petitioner upon:

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by depositing true and correct copies thereof at the Post Office maintaned by the United States Postal Service at 73 Pine Street, New York, New York, by first class mail, postage prepaid.

Robert R Cawthorn

Sworn to before me this
26th day of January, 1976

Notary Public

JOHN NICOL
Notary Public, State of New York
No. 60 2880500
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires March 30, 1977